

# Role of Settlements and Commitments in Competition Law Enforcement

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## ABSTRACT

Settlements and commitments provisions play a crucial role in competition law enforcement, as they allow for the resolution of cases without the need for lengthy and costly litigation. The EU and USA antitrust laws incorporate settlement and commitment procedures, empowering antitrust authorities to enforce competition laws efficiently. These mechanisms expedite case resolutions, tailor remedies, and promote compliance, creating a competitive market landscape that favors consumers and businesses alike. However, Indian competition law previously lacked these provisions. The Competition Commission of India (CCI) encountered challenges in promptly addressing situations where businesses proposed voluntary conduct modifications to avert prolonged investigations and adverse publicity. To remedy this, the Competition (Amendment) Act, 2023 introduced provisions for settlement and commitment agreements. These provisions are now regulated by the CCI through the 'CCI (Commitment) Regulation, 2024' and 'CCI (Settlement) Regulation, 2024,' which were developed after seeking and evaluating stakeholder feedback and suggestions. This article initially presents the settlement and commitment provisions under US and EU antitrust laws and cases which are settle/committed by their provisions. It then examines the new settlement and commitment regulations in Indian competition law. This article also highlights the advantages and provides recommendations for settlement and commitment provisions in Indian competition law.

**Keywords:** Competition Law, Regulation, Settlement, Commitment

## 1. INTRODUCTION

The Antitrust Division of the Department of Justice (DOJ) and the Federal Trade Commission (FTC) establish comprehensive guidelines and policies governing the resolution of antitrust lawsuits. These guidelines define the criteria and procedures for negotiating settlements and implementing consent decrees. The European Union has a well-defined framework for handling settlements and commitments in antitrust cases, primarily governed by the Treaty on the Functioning of the European Union (TFEU), specifically Articles 101 and 102, and various regulations and guidelines issued by the European Commission. Before Competition (Amendment) Act, 2023, the Competition Act, 2002 has granted the power to the Commission to deal with contravention by companies<sup>1</sup>. Following key features regarding contravention of companies provided by the Competition Act, 2002:-

1. If a person violates any provision of an Act, rule, regulation, order, or direction, then all persons in charge of the company at the time of the violation are held responsible for the contravention alongsi-

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<sup>1</sup>Competition (Amendment) Act, 2007 (Act 39 of 2007),sec.48

de the company. They will be subject to the prescribed punishment<sup>2</sup>.

2. A person shall not be liable for punishment, if they can demonstrate that the contravention was committed without their knowledge or that they exercised all reasonable diligence to prevent its occurrence<sup>3</sup>.
3. If the contravention occurs with the consent, connivance, or negligence of any company director, manager, secretary, or other officer, that individual will be deemed guilty of the contravention and subject to punishment<sup>4</sup>.

Now Competition (Amendment) Act, 2023 incorporates novel mechanisms, including a 'settlement'<sup>5</sup> and commitment<sup>6</sup> framework to minimize legal disputes. Settlement clauses enable entities that are accused of anti-competitive practices and want to settle the matter by acknowledging the infringement and committing to corrective actions. Commitment provisions empower entities to proactively offer pledges to discontinue alleged anti-competitive behavior, while avoiding any admission of wrongdoing. The Competition Commission of India (CCI), empowered by Section 64(1) of the Act to create regulations for its operations. Therefore CCI proposed a draft regulation for Commitment Regulations 2023 and Settlement Regulations 2023. These drafts aimed to establish procedures for commitment and settlement proceedings. The CCI published these draft regulations on its website for public consultation and subsequently reviewed the feedback received. Based on this feedback, the CCI finalized the Competition Commission of India (Commitment Regulations, 2024)<sup>7</sup> and Competition Commission of India (Settlement Regulations 2024)<sup>8</sup>. Commitment Regulations offer parties who have violated provisions of the Act the opportunity to submit Commitments to cease their violations. By doing so, they can avoid a detailed investigation by the DG. Settlement regulations offer parties to 'settle' their case with the CCI, potentially avoiding extensive inquiries, hearings, hefty penalties, and the associated costs of litigation. This article in next section presents the detailed provision of settlement and commitment mechanism in USA, EU and India.

## 2. USA AND EU REGULATION FOR COMMITMENT & SETTLEMENT

### UNITED STATE OF AMERICA:

The US Federal Trade Commission (FTC) and the Department of Justice (DOJ) utilize parallel processes to enforce commitment decisions. While the DOJ files consent decrees, or civil consent judgments, in federal district courts to resolve cases without trial, the FTC relies on its statutory authority to issue negotiated administrative consent orders for the same purpose. These consent decrees and orders are employed not only in merger cases but also to settle alleged competition violations involving both unilateral conduct, such as exclusive dealing and monopolization, and unlawful vertical agreements<sup>9</sup>.

Settlement and commitment provisions in U.S. antitrust law offer advantages to antitrust authorities such as the Department of Justice (DOJ) and the Federal Trade Commission (FTC) and directly or indirectly

<sup>2</sup>Competition (Amendment) Act, 2007 (Act 39 of 2007),sec.48(1)

<sup>3</sup>Proviso to Section 48(1), Competition Act,2002

<sup>4</sup>Competition (Amendment) Act, 2007 (Act 39 of 2007),sec .48(2)

<sup>5</sup>Competition Act,2002(Act 12 of 2003) sec.48A,Ins. by Competition (Amendment) Act,2023(Act 9 of 2023)

<sup>6</sup> Competition Act,2002(Act 12 of 2003)sec.48B,Ins. by Competition (Amendment) Act,2023 (Act 9 of 2023)

<sup>7</sup> Govt of India, CCI, notification no. 03 of 2024, The Competition Commission of India (Commitment) regulations, 2024, New Delhi, March , 6<sup>th</sup> , 2024.

<sup>8</sup> Govt of India, CCI, notification no. 04 of 2024, The Competition Commission of India (Settlement) regulations, 2024, New Delhi, March , 6<sup>th</sup> , 2024.

<sup>9</sup> Antitrust Procedures and Penalties Act (APPA) or Tunney Act (15 U.S.C), sec. 16

to the consumer. For example, in 1998, the DOJ accused Microsoft of monopolizing the PC operating systems market through anti-competitive practices and this case was settled by Microsoft in 2001 with a consent decree that imposed conduct remedies without admission of wrongdoing. The settlement aimed to enhance competition in the software market<sup>10</sup>. In another case, The DOJ challenged American Express's anti-steering ruling, which prohibited merchants from promoting cheaper credit cards. Following a court ruling in favor of the DOJ in 2018, American Express agreed to modify its rules. The settlement facilitated immediate changes that fostered competition among credit card networks, benefiting merchants and consumers<sup>11</sup>. In 2012, the DOJ accused Apple and several publishers of conspiring to fix eBook prices. Apple settled this case in 2013 through monetary payments and compliance measures designed to prevent future anti-competitive behavior<sup>12</sup>.

### EUROPEAN UNION:

The primary provisions for settlements in EU competition law are outlined in EC Regulation<sup>13</sup> on implementing competition rules under Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU). Procedural rules for settlements are specified in EC Regulation Articles 10a and 10b<sup>14</sup> as amended by EC Regulation<sup>15</sup>. These regulations cover the initiation, conduct, and submission of settlement discussions<sup>16</sup> as well as the Commission's authority to adopt settlement decisions and grant reduced fines<sup>17</sup>. The legal basis for commitment procedures is also found in EC Regulation<sup>18</sup>. EC Regulation empowers the European Commission to make commitments offered by companies legally binding if they resolve competition concerns identified by the Commission<sup>19</sup>.

The EU's settlement and commitment provisions offer advantages to both the EU Commission and, directly or indirectly, to consumers. These provisions allow the Commission to effectively address competition concerns without resorting to lengthy and costly legal proceedings. In 2009, the EU Commission investigated Microsoft for bundling its Internet Explorer browser with the Windows operating system, which was deemed an abuse of its market dominance. Microsoft agreed to offer a browser choice screen to European Windows users, allowing them to select from various web browsers. This commitment addressed the competition concerns and provided consumers with more choice<sup>20</sup>. In 2017, The EU Commission found that Google had unfairly favored its own comparison shopping service, abusing its market dominance. While Google initially resisted settlement, it eventually proposed and implemented changes to its service, including adjustments to how shopping results were displayed. These changes addressed the Commission's concerns and ensured a more competitive online shopping market for consumers<sup>21</sup>. In another example, GE's proposed acquisition of Alstom's power and grid business raised competition concerns in the heavy-duty gas turbine market. The European Commission found that while the merger would reduce competition in certain markets, it would not significantly

<sup>10</sup> United States v. Microsoft Corp., 253 F.3d 34

<sup>11</sup> Ohio v. American Express Co., 138 S. Ct. 2274 (2018)

<sup>12</sup> United States v. Apple Inc., 952 F. Supp. 2d 638 (2013)

<sup>13</sup> EC Regulation (Regulation No 1 of 2003)

<sup>14</sup> EC Regulation (Regulation No 773 of 2004)

<sup>15</sup> EC Regulation (Regulation No 662 of 2008)

<sup>16</sup> EC Regulation (Regulation No 773 of 2004), art 10a

<sup>17</sup> EC Regulation (Regulation No 773 of 2004), art 10b

<sup>18</sup> EC Regulation (Regulation No 1 of 2003)

<sup>19</sup> EC Regulation (Regulation No 1 of 2003), art.9

<sup>20</sup> European Union, official Journal (OJ L 32), 4.2.2010, p. 34–37

<sup>21</sup> European Union, official Journal (OJ C 9), 12.1.2018, p. 11–14

impede effective competition in the European Economic Area (EEA). To alleviate these concerns, GE committed to divesting parts of Alstom's heavy-duty gas turbine business in 2015. This commitment allowed the merger to proceed while ensuring competition was preserved in the gas turbine market<sup>22</sup>. Hence, it is evident that the commitment /settlement enabled antitrust regulatory bodies to swiftly tackle anti-competitive practices, avoiding prolonged court cases. This outcome was beneficial not only for the accused party but also for the consumers.

### 3. INDIA REGULATION FOR COMMITMENT & SETTLEMENT

India is familiar with the concept of settlements, particularly in the securities market. The Securities and Exchange Board of India (SEBI) has established a mechanism for these settlements, outlined in the SEBI Act, 1992, and the SEBI (Settlement of Administrative and Civil Proceedings) Regulations, 2014. This mechanism allows for the resolution of specific violations of securities market laws through the payment of fees without requiring an admission of guilt. CCI's consideration of a settlement mechanism is not a new concept, as other regulatory bodies have previously implemented similar arrangements. Settlement /Commitment mechanism under Competition Act is presented here:-

#### 1. AIM OF REGULATION:

**Commitment:** The Commitment Regulations apply to enterprises that are suspected of violating Section 3(4) or Section 4 of the Act. Entities can voluntarily provide commitments to terminate suspected anti-competitive conduct. These commitments aim to restore competition and prevent further violations.

**Settlement:** The Settlement Regulations are designed for enterprises that have been found by the DG, following a thorough investigation, to have violated the provisions of the Act.

**2. INFORMATION IN APPLICATION:** The Commitment/settlement applicant may write to the Commission for with containing following information's:-

- 1. Details of Company :** Name of Applicant, Legal Name of Company/form or trust etc., Registration Number ,Contact details with phone number email id, website detail etc.
- 2. Proof of fee.** The fees for settlement application is given as under:-
  - A. Rs. 2,50,000 only , if the Settlement Applicant has a total turnover of up to Rs. 50,00,00,000 (rupees fifty crores) in India for the preceding financial year, or
  - B. Rs. 10,00,000 (rupees ten lakh) only, if the Settlement Applicant has total turnover exceeding Rs. 50,00,00,000 (rupees fifty crores) and up to Rs. 500,00,00,000 (rupees five hundred crores) in India for the preceding financial year.
  - C. Rs. 50, 00,000 (rupees fifty lakh) only, if the Settlement Applicant has total turnover exceeding Rs. 500, 00, 00,000 (rupees five hundred crores) in India for the preceding year.
- 3. Details of finding/order:** In case Settlement, full detail of DG investigation report. In case of commitment, full details of prima facie opinion of CCI u/s 26(1) of the Act
- 4. Details of contravention:** Nature, gravity, its impact and duration of contravention, any other pending proceeding, any past settlement /commitment in other jurisdiction etc
- 5. Documents:** Certified copy of documents<sup>23</sup>
- 6. Details of Proposal:** full details of settlement/commitment Undertaking and waivers schedule I as per the settlement/commitment regulation 2024.

<sup>22</sup> European Union , official Journal (OJ L 275) 22.10.2015, p. 47–56

<sup>23</sup> Competition Commission of India (General) Regulations, 2009

Any other information.

**3. TIME LINE:** Before the Competition Commission of India (CCI) issues its final determination, the respondent can propose a settlement/commitment. Time line for settlement/commitment application as under:-

- 1. Application Acceptance Timeline:** The Commission will not accept settlement/commitment applications submitted more than 45 days after the DG investigation report is issued. However, the Commission may consider applications submitted within 30 days after the 45-day deadline if it is satisfied that there was a valid reason for the delay in submission.
- 2. Application rectification timeline:** If the settlement/commitment application is found to have defects or missing documents, the Commission will grant the applicant 10 days to rectify the defects or provide the required documents.
- 3. Application withdrawal timeline:** An applicant may withdraw a settlement/commitment application at any time prior to the issuance of an order by the Commission.
- 4. Proposal consideration timeline:** Commission considered the settlement application within 7 working days of the receipt of application. If the Commission *Prima facie* is not satisfied or incomplete application then the Commission calls the applicant to furnish the revised settlement application within 15 working days.
- 5. Objection/suggestion on proposed commitment/settlement:** The Commission will give the concerned party, the Director General, and any other interested party 21 days to submit comments, objections, or suggestions regarding the proposed Commitment/settlement.
- 6. Settlement Amount pay timeline:** The settlement Applicant will be notified of the Settlement amount by CCI. This amount must be accepted within 15 days and paid in full within 30 days. No changes to the Settlement amount will be permitted.
- 7. Complete process timeline:** The settlement process will be finalized within 180 working days after the complete Settlement Application is received. The Commission has the authority to extend the 180-day working period. The Commitment process will be finalized within 130 working days after the complete Commitment Application is received. The Commission has the authority to extend the 130-day working period. This extension can be granted for any specified duration, if deemed necessary, and must be documented in writing.
- 8. Reply of Shown cause notice timeline:** The settlement/commitment applicant fails to comply with the Commission's order, the Commission shall issue a show-cause notice granting the Applicant a period of 15 working days from receipt to demonstrate compliance.

#### **4. SETUP FOR DEALING:**

- 1. Prima facie not satisfied/incomplete application:** In that case, Commission calls the applicant to furnish the revised settlement/commitment application as time specified in regulation.
- 2. Complete application:** In this case, the inquiry will be held in abeyance until a final decision is reached or until such time as determined by the CCI.
- 3. Comments:** The Commission will give the concerned party, the Director General, and any other interested party to submit comments, objections, or suggestions regarding the proposed settlement/commitments.

**4. Computing Settlement amount:** The Settlement Amount, as calculated and communicated to the Settlement Applicant, is deemed final and binding. Failure to do so will result in the commission rejecting the Settlement Application and proceeding with its inquiry under section 26 of the Act.

**5. CCI ORDER:**

- 1. Proposal Acceptance order:** Upon acceptance of the Commitment/Settlement, the CCI shall issue an order approving it, subject to any additional terms concerning implementation, monitoring, and the closure of proceedings.
- 2. Application rejection order:** when the CCI unsatisfactory with the settlement/commitment, then the commission reject application at any time and investigate under Section 26.
- 3. Interim Order:** During the pendency of a Settlement/commitment Application, the commission may issue interim and/or other directions to protect the interest of consumers.
- 4. Revocation and withdrawal Order:** Failure to comply with the CCI's orders under Section 48A or 48B of the Act, or any discovery of incomplete or inaccurate disclosures or significant changes in the facts, will result in the revocation and withdrawal of the Commitment/Settlement order issued by the CCI<sup>24</sup>. Upon the revocation and withdrawal of the settlement/commitment order, the Settlement/commitment Applicant shall incurred a penalty of one crore rupees. Further, The Commission retains the authority to reinstate or commence inquiries or investigations against the Settlement/commitment Applicant.

**6. OTHER FEATURES OF REGULATION:**

- 1. Monitoring agency:** The Competition Commission of India (CCI) may appoint monitoring agencies to supervise the execution of Commitment/Settlement orders.
- 2. Power to use information:** If the Competition Commission of India (CCI) has revoked and withdrawn the Commitment/Settlement order, the CCI and the Director-General (DG) may utilize the information or documents submitted by the Applicant.
- 3. Partial commitment:** An applicant for Commitment may submit partial commitments, but inquiries regarding any remaining infringements will still proceed. Conversely, an applicant for Settlement is required to provide full settlement for all infringements identified in the DG's investigation report.
- 4. Right to clam compensation:** While a settlement order from the Competition Commission of India (CCI) may resolve the competition issue, it will not shield an enterprise from claims for compensation by victims of their anti-competitive conduct, as per Section 53N of the Act.

**7. BENEFITS OF SETTLEMENT & COMMITMENT PROVISION**

- 1.** Settlement and Commitment provisions enable a more expeditious resolution of disputes, conserving time and resources for both parties and the CCI.
- 2.** These provisions play a crucial role in mitigating protracted litigation and the uncertainty inherent in extended investigations.
- 3.** Cooperation with the Competition Commission of India (CCI) and rectification of conduct may lead to reduced or even eliminated penalties for entities.

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<sup>24</sup> Competition Act,2002(Act 12 of 2003)sec.48C,Ins. by Competition (Amendment) Act,2023 (Act 9 of 2023)

4. The dynamic nature of settlement/commitment mechanism benefits digital markets by preventing irreversible losses to parties involved in lengthy and complex litigation processes, enabling the CCI to resolve these cases expeditiously.

## 8. SUGGESTIONS

1. **Transparency:** The CCI may require the party to publish details of the settlement or commitments to ensure transparency.
2. **Monitoring:** The CCI also monitoring whether the entities compliance the mechanism as per the agreed terms or not to avoid future violation.
3. **Market testing:** To enhance the effectiveness of commitments, a formal market testing phase should be implemented. During this phase, external parties would have the opportunity to provide input on proposed commitments, ensuring that they thoroughly alleviate competition concerns.
4. **Training:** Allocate resources to ensure that CCI staff receives continuous training and development opportunities to maintain their expertise in handling complex settlement and commitment cases.
5. **Expert Panels:** The CCI should consider establishing expert panels or committees to provide assistance in evaluating settlement and commitment proposals, especially in cases that exhibit technical or complex characteristics.
6. **Stakeholder feedback:** To ensure the effectiveness of the settlement and commitment provisions, regular engagement with stakeholders, such as businesses, consumer groups, and legal practitioners, is crucial. This ongoing dialogue will provide valuable feedback, enabling the refinement of processes and addressing any practical challenges that may arise.

## 9. CONCLUSION

The implementation of a commitments and settlements framework is widely acknowledged for improving procedural efficiency and accelerating the resolution of antitrust disputes. From an enterprise's perspective, the primary appeal of settlement mechanisms and commitment procedures lies in their ability to swiftly resolve antitrust matters. These procedures provide additional benefits, such as transparency and predictability, which are essential principles for any organization. Furthermore, opting for a settlement/commitment process mitigates the potential reputational damage that an antitrust investigation may inflict. The uncertain outcome of an investigation poses significant risks, including substantial penalties for the enterprise and its employees, as well as potential negative impacts on the company's stock prices. Antitrust laws in the European Union and the United States provide for settlement and commitment procedures that offer considerable benefits to antitrust authorities in enforcing competition policy, as evidenced by the numerous cases resolved through these mechanisms. India recently introduced a regulated settlement and commitment mechanism, which has proven beneficial to Indian competition authorities, alleged parties, and consumers alike, without compromising the competitive market environment. By embracing a more transparent, efficient, and adaptable approach, the Competition Commission of India (CCI) can harness these provisions to foster a competitive market while minimizing the burden on businesses and the regulatory body.

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